82474-6

NO. 36089-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GEORGE KELLEY, as guardian for BB, PB, and NB, minor children,

Appellant,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Respondents.

RESPONDENT'S ANSWER TO WSTLA BRIEFING

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OTHER AUTHORITY

I. INTRODUCTION

The Washington State Trial Lawyers Association Foundation's (hereinafter "WSTLA") reasoning that as a matter of law the children could not bring a lawsuit because they did not have a guardian ad litem is circular. If validated by this Court, then all minor Plaintiffs, their parents and counsel could use this argument to simply decide to not appoint a guardian ad litem, lay in the weeds and bring a lawsuit at a later time. This defeats the public policy of preventing a multiplicity of lawsuits as outlined by the Washington State Supreme Court in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984)[1].

II. ISSUE PRESENTED

The issue is absolutely not, as WSTLA states in the first line of the introduction to its brief, "whether three minor children should be deemed to have forfeited their right to sue for the tort of loss of parental consortium because no one acted on their behalf to join them as parties in their father's prior tort action." It is of great concern to this Respondent that WSTLA, as well as Appellants, have lost sight of the real issue in this case. The only legal issue before this Court is whether Appellants met their burden of proving it was not feasible to join in their parents underlying lawsuit based on the

[1] The official State Report Title for this case is *Ueland v. Pengo Hydra-Pull Corporation.* However, the parties and this Court have previously referred to this case as *Ueland v. Reynolds Metals Co.* Respondent chose to continue to use the more familiar title of the case for the sake of continuity.

record according to *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984).

III. STATEMENT OF THE CASE

Appellants in the present case, the minor children, are represented by Darrell Cochran, the same attorney that represented their parents in the original lawsuit. CP 19. The parents' case went to trial and verdict was entered on September 22, 2005. CP 24.

Appellants filed their own lawsuit on April 6, 2006 and filed an Amended Complaint on April 16, 2006. CP 19-25. The Appellants' parents filed a petition to appoint them a guardian ad litem on May 3, 2006, which is approximately one month after the minor children's lawsuit was filed. CP ____.[2] The Order Appointing George Kelley as Guardian was entered May 8, 2006. CP ___.[3]

In response to Defendant's motion to dismiss the minors' claims in Superior Court, Plaintiffs' argued joinder was not feasible because of the manifestation of the timing of their father's physical injuries. CP 53-61. The Superior Court, though, held that Plaintiffs failed to meet their burden of proving it was not feasible to join in their parents' lawsuit. CP 87-88.

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[2] As of the date Respondent's answer to amicus briefing was due, Respondent had not been served with Appellant's supplemental designation of clerk's papers regarding the Order Appointing George Kelley as Guardian as ordered by this Court on July 10, 2008. Moreover, Respondent has not received Clerk's Papers regarding the Order Appointing George Kelley as Guardian as of the date of this answer to amicus briefing. Therefore, Respondent is unable to provide a clerk's paper number at this time.

[3] Id.

In Appellants' Opening Brief to the Court of Appeals they, again, argued that joinder was not feasible because of the manifestation of the timing of their father's physical injuries.

IV. ARGUMENT

A. WSTLA'S ARGUMENT MERELY SERVES TO ENCOURAGE MULTIPLICITY OF LAWSUITS, WHICH IS AGAINST PUBLIC POLICY.

Obtaining a guardian ad litem for a minor is a procedural matter that is routine and expected in the majority of cases involving minors. The courts would be inundated with multiple lawsuits if parties were to plead they simply did not bring a lawsuit, because they did not have a guardian ad litem. In the case of a minor's loss of consortium claim, such an argument flies in the face of public policy against multiplicity of lawsuits as outlined in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984) and other jurisdictions.

In order to balance the public policy issues of a multiplicity of lawsuits and still provide children the right to bring a loss of consortium claim, the Supreme Court devised a compromise. The Supreme Court held in *Ueland*:

> ...children's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. A child may not bring a separate consortium claim unless he or she can show why joinder with the parent's underlying claim was not feasible.

103 Wn.2d at 194 (Emphasis added). The majority of the other 14 States providing children loss of consortium claims express the same concern. *See Hay v. Medical Center Hosp. of Vermont*, 145 Vt. 533, 496 A.2d 939 (1985) (minor's claim must be joined when feasible to prevent multiple lawsuits arising from same incident); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171 (1990) (joinder quells concerns over multiplicity of suits); *Belcher v. Goins*, 184 W.Va. 395, 400 S.E.2d 830 (1990) (requiring joinder is a fair and practical solution to concern of multiplicity of actions).

In fact, in the Ohio case of *Coleman v. Sandoz Pharm. Corp.*, 74 Ohio.St.3d 492, 493-94, 660 N.E.2d 424 (1996), the court was not only concerned with multiplicity of lawsuits, but also reasoned claims must be joined if feasible because of concerns that the minor tolling of the statute of limitations impedes the settlement process.

As set forth in Respondent's Opening and Supplemental Briefing, it would have been more cost effective and taken less time and resources for the minor children to have included their claims with their parents' lawsuit. This case is a perfect example of why the Supreme Court in *Ueland*, and other states, were concerned with the burden and cost of a multiplicity of lawsuits.

B. THE APPELLANTS' REMEDY IS AGAINST THEIR COUNSEL AND NOT RESPONDENT.

In this case, the minors' parents had the responsibility of filing a petition for a guardian ad litem according to RCW 4.08.050.

RCW 4.08.050 provides that:

> A guardian shall be appointed as follows:
>
> (1) When the infant is plaintiff, upon the application of the infant, if he or she be of the age of fourteen years, or if under that age, upon the application of a **relative or friend of the infant**.

(Emphasis added). The parents did exactly that, eventually, in the minors' case when they petitioned for a guardian ad litem after the minors' lawsuit was filed. The parents were represented by Darrell Cochran; the minors' parents had the same attorney in their own lawsuit. The parents, under advice of counsel, made the decision not to appoint a guardian ad litem and join the minor children in their lawsuit. Their remedy after losing their summary judgment is now against their attorney.

The argument by WSTLA, as well as Appellants, that the minor children were unable to make a decision whether to join in their parents' lawsuit without a guardian ad litem appointed by the court is hypocritical. The record on appeal proves that the minors, along with their parents and attorney, were able to make a decision as to whether to file a lawsuit without a guardian ad litem being appointed by the court. The minors' lawsuit was originally filed on April 6, 2006 and George Kelley was not even appointed by the court as their guardian until May 8, 2006, which is one month after

the minor children's' lawsuit was even filed. Clearly, the parents and their attorney were making legal decisions for the minor children well before Mr. Kelley was even appointed by the Court.

C. *THE RECORD DOES NOT SUPPORT WSTLA'S ARGUMENT THE MINORS DID NOT HAVE A GUARDIAN AD LITEM, OR THAT IT WAS NOT FEASIBLE TO HAVE A GUARDIAN AD LITEM, DURING THEIR PARENTS' LAWSUIT.*

Nowhere in the record from the Superior Court did Appellants argue or put forth evidence that it was not feasible to join the children, because they did not have a guardian ad litem appointed. Nowhere in the record from the Superior Court did Appellants argue or put forth admissible evidence that it was not feasible to obtain a guardian ad litem. For instance, Appellants could have argued and provided evidence there was a conflict or difference of opinion about whether suit should be filed and that somehow led to infeasibility.

Instead, Appellants clearly argued and (unsuccessfully) made an attempt to present evidence to the lower court that it was not feasible because of the timing of Mr. Blackshear's physical ailments; absolutely no mention was made of a lack of guardian ad litem, etc. The burden was on Appellants to prove why it was not feasible to join the minor children in their parents' lawsuit and the Superior Court properly found they failed.

D. *THE FACTS OF THIS CASE DO NOT PRESENT AN OCCASION FOR THE COURT TO OVERRIDE A PARENTAL DECISION.*

According to statute, as argued above, the minors' parents were to petition for the guardian ad litem (whether or not through counsel). The facts of this case, though, do not present an occasion for the court to override a parental decision. *In Re Custody of Smith v. Stillwell-Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 the court reasoned:

> A parent's constitutionally protected right to rear his or her children without state interference, has been recognized as a fundamental "liberty" interest protected by the 14th Amendment and also as a fundamental right derived from the privacy rights inherent in the constitution. Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.

To conclude that every minor child who has an injured parent must have a guardian appointed by the court to counsel the children over their parents' objection is absurd.

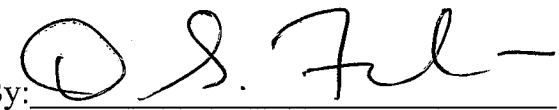
V. CONCLUSION

Appellants have not met their burden of proof according to *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984), since they have not met their burden of proving joinder was not feasible. The Declaration of Phillip Blackshear does not explain why joinder was not feasible and no other admissible evidence has

been presented by Appellants. WSTLA's arguments merely serve to promote a multiplicity of lawsuits, which goes against public policy. Therefore, this Court has no choice but to affirm the trial court's order granting Centennial's motion to dismiss and follow the holding of the Supreme Court in *Ueland.*

Respectfully submitted this 21th day of July, 2008.

MURRAY, DUNHAM & MURRAY

By: 

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CERTIFICATE OF SERVICE

I, Tammy Bolte, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 21st day of July, 2008, I caused a true and correct copy of Respondent's Answer to WSTLA Briefing to be sent via email to the following individuals:

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A copy was also sent via legal messenger for filing with:

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Tammy Bolte